COPY

Office-Supreme Court, U.S.
FILED
SEP 22 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 7

THE HANNA MINING COMPANY, ET AL.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE RESPONDENTS

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway
New York 10004, New York,
Counsel for Respondents.

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Summary of Argument	6
ARGUMENT:	
I. The Picketing Conduct at Superior, Wisconsin In 1953 Which Admittedly Has Arguable Secondary Boycott Aspects Reachable by the Board and Which Has Not Been Considered or Acted On by the Board, Is Not Subject to State Action Under *Garmon*	9
II. Peaceful Picketing at a Common Situs Which In Any Aspect Arguably Violates the Act's Secondary Boycott Prohibition and Which Also Has As An Object Union Recognition on Behalf of Supervisor Is Not Subject to State Regulation	11
III. Peaceful Picketing In a Dispute Involving Supervisors Where Not Prohibited Under the Act Is Left to the Free Play of Economic Forces and Is Not Reachable by the State	19
Conclusion	23
Appendix—Statute Involved	24

Citations

PAGE

CASES:

Automobile Workers v. W.E.R.B., 351 U. S. 266 .. 16
Benz v. Compania Naviera Hidalgo S.A., 353 U. S. 137 18
Bethlehem Steel Co. v. NYSLRB, 330 U. S. 767 ... 20
Capital Service, Inc. v. NLRB, 347 U. S. 501 13
Garner v. Teamsters Union, 346 U. S. 485 ..... 8, 19
Guss v. Utah Labor Relations Board, 353 U. S. 1 21
Incres Steamship Company v. International Maritime Workers Union, 372 U. S. 24 .....7, 17, 18
Liner v. Jafco, 375 U. S. 301 9
Local 20, Teamsters' Union v. Morton, 377 U. S. 252 .....7, 8, 14, 21, 23
Local 100, United Ass'n of Journeymen v. Borden, 373 U. S. 690 9
Local No. 207, International Ass'n of Bridge Workers v. Perko, 373 U. S. 701 9
Local 761, Electrical Workers v. NLRB, 366 U. S. 667 10
Marine Engineers Beneficial Association v. Interlake Steamship Co., 370 U. S. 173 ..6, 7, 9, 14, 15, 16, 18
NLRB v. Budd Mfg. Co., 169 F. 2d 571, certiorari denied, 335 U. S. 908 20
NLRB v. Denver Building & Construction Trade Council, 341 U. S. 675 10
Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 20
Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 10
San Diego Building Trades Council v. Garmon, 359 U. S. 236 .....5, 6, 9, 10, 11, 13, 14, 15, 16, 18, 19
Youngdahl v. Rainfair, 355 U. S. 131 ..... 7, 16

PAGE

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.):

Section 2(3) 2, 20, 24

Section 2(11) 2, 20, 24

Section 7 ..... 9, 24

Section 8(b) 10, 15, 25

Section 8(b)(4) 2, 3, 6, 9, 11, 18, 19, 25

Section 8(b)(7) 2, 3, 25

Section 10(l) 13

Section 14(a) 2, 8, 19, 20, 21, 22, 23, 26

Section 14(b) 21

Section 14(c) 21

MISCELLANEOUS:

H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, 1 Leg. Hist. LMRA (1947) 331 ..... 8, 22

S. Rep. No. 105, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411 22

Websters International Dictionary, 2nd ed., 1959 12

IN THE

Supreme Court of the United States

October Term, 1965

No. 7

THE HANNA MINING COMPANY, et al.,
Petitioners,

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE RESPONDENTS

The Opinions Below

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963 (R. 1-5) and the Order thereon, dated July 26, 1963 (R. 5, 6) have not been reported.

The Judgment (R. 65) affirming the Circuit Court and the Opinion of the Supreme Court of the State of Wisconsin dated April 13, 1964 (R. 66-76) and Order denying a rehearing dated June 30, 1964 (R. 77) are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393.

Jurisdiction

The Judgment of the Supreme Court of Wisconsin was entered on April 13, 1964 (R. 65) and petitioners' motion for rehearing was denied on June 30, 1964. (R. 77.)

The petition for a writ of certiorari was filed on September 23, 1964, and granted on March 15, 1965. (R. 77.)

The jurisdiction of this Court is invoked under Title 28, U.S.C.A. § 1257.

Question Presented

Whether a state court has power to enjoin peaceful picketing at a common situs where such picketing is arguably prohibited under Section 8(b)(4) of the National Labor Relations Act though the dispute involves supervisors as defined in the Act.

Statute Involved

The statutory provisions involved are: Sections 2(3), 2(11), 8(b)(4), 8(b)(7), and 14(a) of the National Labor Relations Act as amended, 29 U. S. C. 152(3) and 152(11), 29 U. S. C. 158(b)(4) and 158(b)(7), 29 U. S. C. 164(a). They are set forth in the Appendix to this brief.

Statement

The picketing by respondents ("MEBA") which was the basis for this action and for which relief was sought by petitioners ("Hanna") in the state court occurred in Superior, Wisconsin and commenced in April, 1963. Other allegations were made in the complaint with respect to picketing activities which occurred in 1962 in Duluth, Minnesota and other ports, and concerning which there were

proceedings before the National Labor Relations Board in 1962.* No Board proceedings were initiated as to the 1963 picketing in Superior, Wisconsin.

The complaint alleged that the picketing in Superior, Wisconsin, against which relief was sought in the state court, started in the latter part of April, 1963. (R. 9, 49.) The picketing was conducted at the shipyard of Fraser-Nelson Ship Building & Dry Dock Company and the ore loading docks of the Great Northern Railway Company in Superior, Wisconsin, and was carried on whenever any vessel owned or operated by Hanna was in the Superior, Wisconsin, dock. (R. 41.)

No claim is made that the picketing involved or threatened violence. The court below noted the absence of any element of violence in the picketing. (R. 70.)

The complaint further alleges that the objectives of this picketing were to compel Hanna to recognize MEBA as the collective bargaining representative for Hanna's engineers despite the contrary desires of such engineers and to "cause work stoppages among dock employees, to prevent harbor tugs from rendering towing services, to cause

---

*The Regional Director of the Board dismissed a representation petition filed by Hanna on September 12, 1962, on the ground that the engineers were "supervisors" within the meaning of the Act. The Board denied Hanna's request for review. (R. 9-10, 49-50, 57-58, 29-30.) The Regional Director of the Board dismissed charges of secondary boycott (Section 8(b)(4)(B) of the Act) filed by Hanna on September 15, 1962, because of insufficient evidence to sustain the charge. The General Counsel of the Board sustained the action of the Regional Director. (R. 10-11, 31-32, 50-51, 53.) The Regional Director refused to issue a complaint on charges filed by Hanna on September 27, 1962 that MEBA engaged in organizational picketing in violation of Section 8(b)(7) of the Act. The grounds for the Regional Director's action, sustained by the General Counsel, was that the supervisory status of the engineers precluded a finding of such violation. (R. 10-11, 34-38, 50-51, 54.) All such proceedings preceded the picketing in Superior, Wisconsin which commenced in April, 1963.

delays in the sailing of plaintiffs' vessels and to cause other economic loss and harm . . .". (R. 11.) The amended complaint, filed after hearing in the circuit court but before decision, characterized the alleged secondary effects as follows:

> ". . . [T]he said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing . . .". (R. 51.)

Hanna prayed that MEBA be enjoined from, among other things, "picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located . . .". The court was also asked to enjoin MEBA from:

> "Attempting in any way to compel persons, partnerships or corporations who either seek to do business or are doing business with or performing services for plaintiff to cease doing its business or performing such services and attempting to compel them or any of them to refuse to enter upon plaintiffs' vessels or docks where such vessels are located." (R. 12.)

It is undisputed that the picketing at Superior, Wisconsin in 1963 was never made the subject of any National Labor Relations Board proceedings and that Hanna had never initiated any such proceedings. (Memorandum for United States as Amicus Curiae, pp. 14-15.) The 1963 picketing was not considered or acted upon by the National Labor Relations Board, its regional directors or General Counsel.

The circuit judge issued a temporary restraining order granting the injunctive relief requested. (R. 13-14.) After hearing on the motion for an injunction and on MEBA's motion to dismiss for lack of jurisdiction, that court determined that it had no jurisdiction. (R. 1-5.) The court noted that the National Labor Relations Board's refusal to "act in a particular case does not necessarily give the state court jurisdiction," and added:

> "Further, we do not know the facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the Fall of 1962 before it issued such order. The complaint in this case, at least, 'arguably', alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board." (R. 4.)

The Supreme Court of the State of Wisconsin unanimously affirmed the order of the circuit court dismissing the complaint for lack of jurisdiction. The court stated:

> "It may well be of significance also, that the activity considered by the general counsel took place in Duluth, Minnesota, in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance." (R. 75.)

However, the court found it unnecessary to consider differences between the 1963 picketing in Superior, Wisconsin and the 1962 picketing in Duluth, Minnesota. The court held that it had no jurisdiction "since such picketing approaches being unlawful under federal law as a secondary boycott . . .", that the National Labor Relations Board had not made the determination required under *Garmon* * that the picketing was neither prohibited nor protected by the Act, and that it could "perceive no escape consistent with the *Garmon* decision." (R. 76.)

---

* *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

Summary of Argument

It is undisputed that the 1963 picketing at Superior, Wisconsin, which forms the basis for the present suit, was peaceful, arguably contained secondary boycott elements and had not been the subject of any National Labor Relations Board consideration or action. Allegations in the complaint with respect to picketing activities which occurred elsewhere in 1962 and concerning which there were proceedings before the Board in 1962 are not relevant to the issues now before the court.

A determination as to whether that 1963 picketing conduct violates Section 8(b)(4) of the Act must be left in the first instance to the Board and not to the courts. *San Diego Trades Council* v. *Garmon*, 309 U. S. 236; *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U. S. 173. The fact that the same picketing may not be protected under the Act and is unlawful under state law because it is alleged to have organizational objectives involving supervisors does not affect the preemption rule.

The peaceful picketing at a common situs, the only conduct here involved, had the dual objects of securing union recognition for petitioners' engineers alleged to be supervisors and of causing work stoppages among employees of other employers. This single indivisible act of peaceful picketing, albeit with two objects and termed a "hybrid" by the petitioners, cannot be split into two parts, one (the "primary" aspects) for regulation by the state and the other (the "secondary" aspects) for the action of the Board. Were the state to prohibit the peaceful picketing there would be nothing left for the operation of the Board's jurisdiction. The effect of such state action would be to preclude the Board from exercising its function in carrying out the national labor policy of the Act. More-

over, since Congress occupied that field of picketing conduct as a matter of national labor policy the state is precluded from asserting jurisdiction. *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252. That principle would apply whether or not the Board would ultimately find that the conduct was prohibited.

Interlake, in which the factual situation is virtually identical with this case, does not permit the severance of the picketing "hybrid" as suggested by petitioners. The Court set aside the entire injunction order issued by the state which prohibited any picketing despite the existence there, as here, of both "primary" picketing aspects affecting supervisors, and "secondary" aspects.

The rule that violent picketing aspects may be enjoined by the state while peaceful picketing is permitted, as expressed in *Youngdahl* v. *Rainfair*, 355 U. S. 131, does not support the suggestion of petitioners that the peaceful picketing "hybrid" here may be split into two parts, one for state action and the other for Board action. Violence, the only exception to the *Garmon* rule of preemption, can be readily extracted from the picketing conduct. Here state action enjoining the peaceful picketing would necessarily eliminate the single act of picketing as a basis for any action by the Board, thereby irretrievably depriving the Board of the opportunity which must be accorded it to exercise its jurisdiction over secondary aspects of that very picketing.

Nor does *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U. S. 24, support the petitioners' suggested splitting of the peaceful picketing "hybrid". In that case the Court held that Congress chose not to make the NLRA applicable at all to disputes involving foreign registered ships. Under the rule of *Incres* the foreign-flag ship owners employing alien seamen may not avail themselves of the NLRA for relief against primary or secondary conduct.

By Section 14(a) of the Act, which grants supervisors the right to unionization and forbids federal or state compulsion against employers to deem supervisors as employees for collective bargaining purposes, Congress expressed a national labor policy affecting supervisors. The legislative history of Section 14(a) shows that the bill "very definitely states a national policy in respect of organization and collective bargaining by foremen." (H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 96). While Congress divested supervisors of the protection of the Act, it designedly left peaceful picketing in support of supervisors' right to unionization, to the free play of economic forces. A state may not impinge on such "free" area of conduct. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500. If a state could in any way prohibit such peaceful picketing by supervisors, their Section 14(a) right to unionization would be made meaningless.

The rule that state regulation cannot reach areas of conduct which Congress designedly left "free" necessarily applies to conduct which may be neither "protected" nor "prohibited" under the Act. The full scope of that rule is expressed in *Local 20, Teamsters Union* v. *Morton*, 377 U. S. at 259-260, which holds that where Congress occupied a field or "focused upon but did not proscribe" conduct, a state may not proscribe the same type of conduct. Under *Morton*, proscription by the state of peaceful picketing involving the unionization of supervisors would "frustrate the congressional determination to leave this weapon of self-help available * * * ."

Having removed supervisors from the Act's protection, Congress was satisfied that the free play of economic forces without state prohibition would be in keeping with the desirability of a "balance of power" between supervisors and their employers. *Morton*, at 259-260.

ARGUMENT

I

The picketing conduct at Superior, Wisconsin in 1963 which admittedly has arguable secondary boycott aspects reachable by the Board and which has not been considered or acted on by the Board, is not subject to state action under *Garmon*.

The United States concedes that the Board's General Counsel "had no opportunity to evaluate the 1963 picketing at Superior, which forms the basis for the present suit, because Hanna did not file an 8(b)(4) charge with regard to that picketing". It is likewise conceded that "the 1963 picketing 'arguably' contained some secondary elements which the Board could reach under 8(b)(4)(B)". (Memorandum for United States, pp. 13-14.)

Nothing more is required to free this "area of conduct" from state regulation under *Garmon*.[1] The simple test stated in *Garmon* and thereafter reiterated and reinforced by this Court[2] is whether the conduct is "arguably" protected or prohibited by the Act. If so, the conduct is preempted for initial determination by the Board. The rationale for the rule of arguability is that where it is not clear whether the particular activity is governed by Sections 7 or 8 of the Act "the courts are not primary tribunals to adjudicate such issues", and that "it is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." (*Garmon*, 359 U. S. at 244-245.)

---

[1] *San Diego Trades Council* v. *Garmon*, 359 U. S. 236.

[2] *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U. S. 173; *Local 100, United Ass'n. of Journeymen* v. *Borden*, 373 U. S. 690; *Local No. 207, International Ass'n. of Bridge Workers* v. *Perko*, 373 U. S. 701; *Liner* v. *Jafco*, 375 U. S. 301.

Where conduct is "arguably" prohibited under the Act, as conceded to be the fact here, the *Garmon* rule is satisfied.[3] That rule cannot be interpreted to mean that where conduct is arguably prohibited, it must also be shown it would be arguably protected if it were not prohibited. Neither *Garmon* nor any of the subsequent decisions of this Court place this additional burden on the preemption doctrine. The decision as to whether the conduct is prohibited is solely within the Board's competence.

If the secondary aspects of the 1963 conduct were found by the Board to be prohibited under the Act, there would be no need for any determination as to whether the conduct was protected. Nor can it properly be a matter of speculation by the federal or state courts that the Board may find the conduct not to be prohibited. Allegations by the petitioner that the 1963 conduct was similar to the 1962 conduct which had been considered by the Board's General Counsel (R. 9, 49) cannot vest jurisdiction in the courts to assume or determine the similarity and to act thereon.[4]

---

[3] For the purpose of determination by the Board as to whether there was a violation of Section 8(b) of the Act it is sufficient that one object of the conduct violates that section. It is not necessary to find that it was the sole object of the picketing. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675. The same rule obviously applies in ascertaining whether such conduct is arguably a violation of Section 8(b) for the purposes of Board preemption.

[4] "The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration." (*Garmon*, 359 U. S. at 242.)

In *Local 761, Electrical Workers* v. *NLRB*, 366 U. S. 667, 674, this Court stated that the "nature of the problem [secondary boycott], as revealed by unfolding variant situations inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer." See also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 800.

The Wisconsin Supreme Court and the Wisconsin Circuit Court both noted that the 1963 conduct at Superior, on which this action is based and which was not the subject of Board consideration, may well have been different from the Duluth picketing in 1962 which was the subject of the actions of the Board or its General Counsel. (R. 75, 4.)

The Wisconsin Supreme Court saw fit to go beyond the simple issue of Board preemption raised by the secondary nature of the 1963 picketing. That Court also addressed itself to the preemption issues raised by the 1962 picketing in Duluth and held that the state court was without jurisdiction, by-passing the question of the differences between the 1962 Duluth and the 1963 Superior picketing. This does not alter the fact that the only revelant issue here is whether the 1963 conduct, which was never considered by the Board, was subject to state court jurisdiction. In any event, by the state court application of the *Garmon* rule to the 1962 picketing, the 1963 picketing was *a fortiorari* arguably within the ambit of Board action and therefore not within the reach of state power.

II

Peaceful picketing at a common situs which in any aspect arguably violates the Act's secondary boycott prohibition and which also has as an object union recognition on behalf of supervisors is not subject to state regulation.

While it is agreed by the petitioners and the United States that the 1963 picketing had secondary aspects which arguably violate Section 8(b)(4)(B) and is therefore reachable by the Board, they suggest that "The State, by an injunction limited to the primary aspects of MEBA's picketing, could reach the part of the picketing which is undeniably within its jurisdiction without at the same time

encroaching upon the Board's jurisdiction over the secondary aspects (if any)". (Memorandum for United States, p. 15; Petitioners' Brief, pp. 32-33.)

The conduct here involved consisted solely of peaceful picketing at a common situs. No other action by the pickets or MEBA is alleged. The objects of the picketing are alleged by Hanna to be twofold: to secure recognition of engineers (alleged to be supervisors) on Hanna's vessels, and to cause work stoppages among individuals or employees of other employers on the common situs. (R. 8-11, 50-52.) The overall relief sought in the state court was a restraint against "Picketing, patrolling or bannering in any way the vessels of the plaintiffs or the docks where said vessels are located . . ." (R. 12.)

Were the position of Hanna and the United States adopted, the activity complained of, *i.e.*, the actual picketing, would irretrievably be placed beyond the reach of the Board. The picketing itself, the only physical conduct involved, cannot be neatly severed into two parts, one for the action of the state and the other for the action of the Board.

Hanna and the United States consider the picketing here a "hybrid" and suggest that such hybrid, by definition a single entity,[5] may be split into two definable entities, one for the action of the Board, the other for the state court. The United States concludes:

> "The fact that the Board may ultimately proceed against the secondary aspects of the picketing consequently affords no valid justification in this case for denying to the State the power to reach that part of the picketing which is clearly within its regulatory sphere." (Memorandum for United States, p. 15.)

---

[5] A "hybrid" has been defined to be "anything of heterogeneous origin or composition," and in relation to living organisms, "a crossbred animal or plant." Webster's International Dictionary, 2nd Ed., 1959, p. 1210.

The fallacy in that approach is that this picketing was a single, indivisible act. Were the state to enjoin the picketing because one object is illegally to compel recognition of the union, the Board could not possibly determine whether the picketing has secondary boycott aspects, simply because there would be no picketing the objects of which could be considered by the Board.

The effect of such state action would be to preclude the Board from exercising a function in the national interest which Congress unequivocally entrusted to the Board.[6] The congressional intent to avoid the danger of conflict between the exercise of power by the Board to administer a national labor policy and the requirements of state law, would be effectively nullified, regardless of the particular means involved to bring about such nullification. *Garmon* considered this danger:

> "Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (*Garmon*, 359 U. S. at 244.)[7]

---

[6] Such state action would also preclude the Board from complying with the Act's mandate to proceed in the district court for a restraint against picketing with secondary aspects under Section 10(l) of the Act. In *Capital Service Inc.* v. *NLRB*, 347 U. S. 501, 505, the Court stated:

> "In order to make the § 10(1) power effective the Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree."

[7] Nor does the fact that petitioner may be injured as the result of state preclusion constitute a valid basis for denying Board preemption. *Garmon* states, "Even the States' salutary effort to redress private wrongs . . . cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." (*Garmon*, at 247.)

In *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252, 259-260, involving Section 303 of the Act, the Court reinforced the rule of *Garmon* by rejecting the reach of state power "to proscribe the same type of conduct which Congress focused upon but did not proscribe * * *." A contrary view, said the Court, would serve "to upset the balance of power between labor and management expressed in our national labor policy." [8]

Marine Engineers Beneficial Association v. *Interlake Steamship Co.*, 370 U. S. 173, militates against severance of the picketing hybrid suggested by petitioners and the United States. But for the question in *Interlake* whether the state court could determine that the union was a "labor organization" within the meaning of the Act, the factual situation there is virtually identical with that now under consideration. The *Garmon* rule applies equally to both situations.

In *Interlake*, as here, an injunction was sought in the state court against MEBA to restrain peaceful picketing which had as an object the recognition of the union as the bargaining representative on behalf of marine engineers employed by Interlake alleged to be supervisors. The picketing was peaceful, was at a common situs, *i. e.*, a dock where the Interlake vessels berthed, and involved secondary boycott aspects. The state court there asserted jurisdiction on the ground that the organizational picketing was addressed to marine engineers who were "supervisors" and therefore not employees within the meaning of the Act. In addition the state court held that MEBA was not a labor organization "within the meaning of the Act" because its membership consisted of supervisors and that therefore

[8] The preemption rule expressed in *Morton* would necessarily apply whether or not the "same type of conduct" (in the instant case, peaceful picketing alleged to involve secondary boycott elements) sought to be proscribed by the state, was acted upon by the Board or the General Counsel.

the NLRB had no jurisdiction with respect to the secondary boycott conduct charge. Injunctive relief was granted by the state court on the ground that the picketing violated the prohibition of state law against organizational or recognitional picketing. (Record, pp. 46-61, *MEBA* v. *Interlake Steamship Co.*, 370 U. S. 173.) The injunction there restrained MEBA from:

> "Picketing in any manner, peaceful or otherwise, at or in the vicinity of any of plaintiffs' vessels in the Duluth harbor, including the vessel Samuel Mather, and the dock operated by Carnegie Dock & Fuel Company at 600 Garfield Avenue, Duluth, Minnesota, and any other dock or similar company at or near which any of plaintiffs' vessels are moored for the purposes of loading or unloading." (Id. at 42.)

MEBA was also restrained from interfering with Interlake's employees' access to and from the vessels and from engaging in any secondary boycott conduct. (Id. at 41-43.)

This Court, in reversing, held that even as to the threshold question of "labor organization" on which rests the Board's jurisdiction over secondary activities, only the Board could make a determination. The *Garmon* rule protecting the exclusivity of NLRB jurisdiction could not be avoided where there was an arguable possibility of Board jurisdiction over the controversy. Moreover this Court said the Board had actually determined that MEBA was a labor organization for the purposes of Section 8(b) of the Act and it was the duty of the state court to defer to the Board's determination. (*Interlake*, 370 U. S. at 184-185.) It is significant that this Court did not confine itself to the secondary aspects of the picketing but set aside the entire injunction order. No suggestion was made by the Court that the recognitional picketing, illegal under state law, was, despite the secondary aspects of the picketing, properly enjoined by the state court.

In the instant case the issue as to whether MEBA was a labor organization within the meaning of the Act was not

in dispute. The record in the state court affirmatively shows that specific rulings had been made by the Board that MEBA was a labor organization. (R. 44-46, 70.) Extracting the issue of labor organization from the *Interlake* case left nothing there but the classic situation requiring the application of *Garmon*. The same is true in the present case, requiring *a fortiorari* the application of the *Garmon* rule.[9]

Youngdahl v. *Rainfair*, 355 U. S. 131, is suggested by the United States as support for its position that both the state and the Board may act in respect to the picketing "hybrid".[10] The Court there held that a state court could enjoin violations "emanating from the picketline", as the United States puts it, but preserved the right to engage in peaceful picketing, an area which is the "preempted 'domain' of the National Labor Relations Board". (*Youngdahl*, at 139.) The Court ordered such a modification in the judgment of the state court which had banned all picketing, peaceful or otherwise. Necessarily implicit in *Youngdahl* was the fact that the acts of violence were readily separable from the act of peaceful picketing. Elimination of the violent conduct by state action left intact the peaceful picketing conduct which was within the Board's "preempted domain."[11]

---

[9] Hanna agrees that the "facts in the instant case closely parallel those in *'Interlake'*" but that the difference between the two cases is that in *Interlake* there had been no prior Board determination on the issues whereas in the instant case relief was sought in the state court after "NLRB initial determinations". (Brief for Petitioners, pp. 25-37.) The simple answer to that is that there had likewise been no prior initial determination by the NLRB with respect to the 1963 picketing in Superior on which the action here is grounded.

[10] Memorandum for United States, p. 15.

[11] The exception of violent conduct to the general rule of Board preemption emphasizes rather than dilutes or diminishes the broad scope of the *Garmon* doctrine. In *Automobile Workers* v. *W.E.R.B.*, 351 U. S. 266, 272-273, fn 10, the Court noted the apparent exclusiveness of the violence exception.

Here, state action enjoining the 1963 peaceful picketing would necessarily eliminate the picketing as a basis for any action by the Board, thereby encroaching on the Board's admitted jurisdiction to act in respect to secondary boycotts.

The United States also suggests that *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U. S. 24, supports its position that the picketing "hybrid" can be split to allow the Board to act on secondary aspects, and characterizes the holding in that case as follows:

> "(State empowered to enjoin primary picketing of foreign flag ships, for the NLRA does not apply to employees on those ships; since such picketing usually occurs in a common situs situation, it, no less than the picketing here, 'arguably' would always have secondary aspects)." (Memorandum for United States, p. 15.)

However, *Incres* was not limited to the issue of "primary" picketing, nor was the holding premised only on the non-applicability of the Act to the employees on foreign flag ships. *Incres* (at 27) held that "maritime operations on foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U. S. C. § 152(6)." In other words, as the Court put it, "the Act does not apply to foreign-registered ships employing alien seamen." (at 26.) The basis for *Incres* was that Congress chose not to make the Act applicable *at all* to disputes involving such foreign flag maritime operations. Although *Incres* had before it evidence of secondary conduct by the unions involved [12] as well as primary activity, the Court did not determine or even suggest that while the primary conduct was enjoinable as beyond the reach of the Act, the secondary conduct, as it affected those foreign flag ship

---

[12] *Incres*, 372 U. S. at 26.

operators, was covered and therefore preempted by the Act.[13]

Answering the question as to whether *Garmon* as applied in *Interlake* results in preemption of state court jurisdiction if a dispute is arguably within the Board's jurisdiction, the Court in *Incres* stated, "... [O]ur decision in Sociedad Nacional clearly negates such [Board] jurisdiction now." (*Incres*, at 27). Unions involved in such situations are deprived of relief under the Act and foreign flag ship operators may also not avail themselves of the Act whether the conduct complained of is "primary" or "secondary".

The argument by the United States, as well as that by petitioners,[14] that, in the light of *Incres*, the state courts here may enjoin "primary" picketing at the common situs as unprotected by the Act and illegal under state law, and at the same time relegate to the Board the secondary aspects of the same picketing under Section 8(b)(4) of the Act, appears contrary to the holding in *Incres*.

---

[13] In *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 137, a foreign flag ship owner sought damages resulting from picketing and secondary activity. The Court held that the Act was not intended to apply to disputes between nationals of other countries operating ships under foreign laws. Mr. Justice Douglas, dissenting, suggested that a possible exception to the rule of *Benz* might be a suit by American companies for relief against injury from secondary conduct arising out of the kind of foreign flag ship dispute there involved. It was not suggested or intimated by the Court or the dissent that the primary employer, *i.e.*, the foreign flag ship employer, has available to him relief from secondary conduct under the National Labor Relations Act.

[14] Brief for Petitioners, pp. 14, 33-34.

III

Peaceful picketing in a dispute involving supervisors where not prohibited under the Act is left to the free play of economic forces and is not reachable by the state.

Even if the Board were to find that the 1963 picketing conduct complained of was not prohibited by Section 8(b)(4) and if it were to be assumed that the peaceful picketing was not protected by the Act because of the alleged supervisory nature of the personnel involved, the question would arise as to whether Congress intended to make available such picketing as a weapon of self-help and outside the reach of the state.[15]

Garner v. *Teamsters Union*, 346 U. S. 485, 500, states, "For a state to impinge on the area of labor conduct designed to be free is quite as much an obstruction of federal policy as if the state declared picketing free for purposes or by methods which the federal Act prohibits". *Garmon* (359 U. S. at 245) puts it this way, "Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States".

Section 14(a) of the Act, adopted as an amendment in 1947, provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

---

[15] The United States agrees that such a question arises under the circumstances noted. (Memorandum for United States, pp. 10-12.)

By this section Congress granted a right to supervisors to join unions.[16] At the same time compulsion against employers in commerce by federal or state law to require collective bargaining for such personnel was prohibited. Section 14(a) evidenced a congressional intent to continue to maintain federal preeminence in the field of labor relations affecting employers subject to the Act and their supervisory personnel. The amendment does not grant jurisdiction to the state court that it did not have under the Act prior to the amendment.

This Court has noted that "the exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting". *Bethlehem Steel Co.* v. *NYSLRB*, 330 U. S. 767, 772; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605.

Here Congress has undertaken to continue to deal with the relationship between employers subject to the Act and their supervisors. The fact that Congress has changed its views on the inclusion of supervisors under the Act and has accorded supervisors a different status outside the Act by not deeming them "employees" [17] is in itself evidence of intention to retain federal control of national labor policy in that area. Under these circumstances and in the absence of any specific contrary congressional mandate that the states may intercede in such area, the states are prevented from doing so.

---

[16] "Section 14(a) of the amended Act specifically reserves to them [supervisory employees] the right to join a labor organization." *NLRB* v. *Budd Mfg. Co.*, 169 F. 2d 571, certiorari denied, 335 U. S. 908.

[17] Sections 2(3) and 2(11) of the Act.

Nor is there any ambiguity in the congressional desire on this issue. Section 14(b) of the Act,[18] adopted simultaneously with 14(a), was deliberately designed to release to the states from the preemption of the Act certain other specific conduct. Congress was well aware of the complex problems affecting state jurisdiction and saw fit to adopt one approach in Section 14(a) relating to supervisors and another affecting union security agreements. When Section 14(c) was adopted in 1959, Congress again meticulously delineated the federal-state jurisdictional areas which arose after this Court's decision in *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1.

Congress was not "indifferent" to the problems affecting supervisors. On the contrary, Congress was concerned enough to express a national policy regarding supervisors, albeit it was a different policy from that which had theretofore existed under the Act. There is no suggestion in Section 14(a), or elsewhere in the Act, that having granted supervisors the right of unionization, such right would be subject to state regulation. If a state could in any way prohibit peaceful picketing by supervisors, the Section 14(a) right of supervisors to become or remain members of a union would be meaningless.

Morton[19] teaches that where Congress occupies a field or focuses upon but does not proscribe conduct, state regulation of the same type of conduct is foreclosed. By Section 14(a), Congress occupied the field of labor relations involving supervisors. Under *Morton*, proscription by the state of peaceful picketing involving the organization of

---

[18] Section 14(b) provides, "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or Territory in which such execution or application is prohibited by state or Territorial law."

[19] *Local 20, Teamsters Union* v. *Morton*, 377 U. S. 252, 260.

supervisors would "frustrate the congressional determination to leave this weapon of self-help available . . ."

House Report No. 245 on H. R. 3030 which contained in its Section 14 the identical provision of what became Section 14(a) of the Act makes the following comments on that provision:

> "As under the present act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the States a concurrent jurisdiction in respect of closed-shop and other union-security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. *Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen.*" H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, 1 Leg. Hist. LMRA (1947) 331. (Emphasis added.)[20]

It is the "national policy" expressed in Section 14(a) which has the effect of precluding state action as to super-

---

[20] The Senate Report on Section 14(a) states:

> "It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock* case (49 N.L.R.B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411.

visors' organizational activities where their employers are subject to the Act.

The United States acknowledges that peaceful picketing may fall "within the area which Congress has designedly left to the free play of economic forces" (Memorandum for United States, p. 7.) Peaceful picketing to effectuate the right of supervisors to belong to unions granted them by Section 14(a) is just such an area. Having removed supervisors from the Act's protection, Congress was satisfied that the free play of economic forces without state interference or the Act's protection would sustain the kind of reasonable "balance of power" between supervisors and their employers. See *Morton*, 377 U. S. at 260.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

September 21, 1965.

Respectfully submitted,

LEE PRESSMAN,
DAVID SCRIBNER,
50 Broadway
New York 10004, New York,
Counsel for Respondents.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

SEC. 2. * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such

activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

SECTION 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) To engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representa-

tive of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * *

SECTION 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.